No. 87-776 (4)

In The

Supreme Court of the United States

October Term, 1987

TRANSPORTATION COMMUNICATIONS UNION,

Petitioner,

v.

THE BALTIMORE AND
OHIO RAILROAD COMPANY,

Respondent.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

H. Russel Smouse
D. Christopher Ohly
Melnicove, Kaufman, Weiner,
Smouse & Garbis, P.A.
36 S. Charles Street, 6th Floor
Baltimore, MD 21201
(301) 332-8500

Attorneys for Respondent

Of Counsel:

Thomas L. Samuel
Nicholas S. Yovanovic
CSX Transportation
500 Water Street
Jacksonville, FL 32202

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TABLE OF AUTHORITIES

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The Union has asserted, in its Supplemental Brief in Support of its Petition for a Writ of Certiorari, that this Court's recent decision in *United Paperworkers v. Misco, Inc.*, — U.S. —, 56 U.S.L.W. 4011 (1987), is "relevant to the question presented by [the Union's] petition," and, presumably, supports the Union's assertion that a writ of certiorari should be granted. *See Supplemental Brief* at 1. Since *Misco* did not alter the prior holdings of this Court concerning the standards to be applied by the lower

courts in reviewing arbitral decisions and, instead, reiterated what this Court "made clear almost 30 years ago" in the *Steelworkers* trilogy, *Misco,* 56 U.S.L.W. at 4013, nothing in *Misco* should compel the Court to grant certiorari in this case.

A. First, this Court granted certiorari in *Misco* because "the Courts of Appeal [were] divided on the question of when courts may set aside arbitration awards contravening public policy . . ." *Id.,* 56 U.S.L.W. at 4013. *Misco* reversed a decision of the Fifth Circuit which held that an arbitrator's reinstatement of an employee who had been dismissed because he allegedly possessed marijuana on plant premises would violate the public policy "against the operation of dangerous machinery by persons under the influence of drugs or alcohol." *Id., quoting Misco,* 768 F.2d 739, 743 (5th Cir. 1985). This Court set aside the decision of the Fifth Circuit, because the Fifth Circuit's decision did not conform to the guidelines established by this Court in *W.R. Grace & Co. v. Rubber Workers,* 481 U.S. 757 (1983), and because no violation of the public policy enunciated by the Fifth Circuit "was clearly shown", even if that Court of Appeals' formulation of that public policy was correct.

In the present case, no issue of "public policy" is presented. The opinions of the trial court and the Fourth Circuit did not consider issues of "public policy" and, instead, ruled that the NRAB panel decisions at issue here exceeded the jurisdiction of the NRAB. Since *Misco* was decided on issues of "public policy", the holding in *Misco* is irrelevant to any decision in this case.

For similar reasons, this Court need not remand this case for reconsideration in light of *Misco,* as suggested by

the Union. There is no reason to believe that the Fourth Circuit would have decided this case any differently had it reached its decision after *Misco*. The decision in *S.D. Warren Co. v. United Paperworkers,* 815 F.2d 178 (1st Cir. 1987), *remanded* — U.S. —, No. 87-583 (Dec. 14, 1987), upon which the Union has relied, was vacated and remanded by this Court because it held that an arbitrator's award should be set aside because it violated "public policy". *Id.*, 815 F.2d at 186-87. This case does not involve such "public policy" considerations.[1]

B. Second, "arbitration" before the NRAB was compelled in this case by congressional enactment, the Railway Labor Act, 45 U.S.C. § 151 *et seq.* While it is true that judicial review of NRAB awards was intended to "be limited to those grounds commonly provided for review of arbitration awards," as the Union suggests, *see Supplemental Brief* at 3, *quoting* S. Rep. No. 1201, 89th Cong., 2d Sess. 3 (1966), [1966] U.S. Code Cong. & Admin. News, p. 2287, it is equally true that Congress intended that the Federal courts would "have the power to decline to enforce an award is [is] actually and indisputedly without foundation in reason or fact . . ." S. Rep. No. 1201, 89th Cong., 2d Sess. 3 (1966), [1966] U.S. Code

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[1]Moreover, contrary to the Union's intimation, *see Supplemental Brief* at 4, the decision of the Fourth Circuit did not even address the issue of remedies. To the contrary, although the District Court vacated the monetary awards in this case on the separate ground that they awarded the Union "penalty pay", the Fourth Circuit stated explicitly that it "need not reach, and therefore, [did] not decide the issue of penalty pay." *Pet. App.* at 9a. Hence, the Union's incantation of a small portion of the language of *Enterprise Wheel,* quoted in *Misco,* relating to the scope of an arbitrator's discretion in formulating remedies, *Supplemental Brief* at 4, is misleading and uninformative.

Cong. & Admin. News, p. 2287. *See, also, Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co.*, 415 F.2d 403, 410 (5th Cir. 1969).

In *Misco,* the Court considered an agreement to arbitrate, voluntarily undertaken in a collective bargaining agreement. However narrow may be the scope of the lower Federal court's review of arbitral awards rendered under pure collective bargaining agreements, even *Misco* did not foreclose all review. In *Misco,* this Court gave explicit recognition to the principle that an "arbitrator may not ignore the plain language of the contract . . ." *Misco,* 56 U.S.L.W. at 4014, *citing Steelworkers v. Enterprise Wheel,* 363 U.S. 593, 599 (1980). Both in *Enterprise Wheel* and again in *Misco* this Court has said that "the arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must *draw its essence from the contract* and cannot simply reflect the arbitrator's own notions of industrial justice." *Misco,* 56 U.S.L.W. at 4014 (emphasis added).

The constitutional considerations implicated in *Misco,* where arbitration occurred purely under private agreement, are different from those which may be implicated here, where "arbitration" is compelled by Federal statute. If courts were bound by Federal statute to uphold wholly baseless awards, serious constitutional problems would exist under Article III, which guarantees the right to judicial review. *See, Northern Pipeline Const. Co. v. Marathon Pipeline Co.,* 102 S.Ct. 2858 (1982). Entirely different considerations would apply in the purely private sphere, where parties may contract away some of their rights to judicial review, in part by concluding agreements to arbitrate. What the Union seeks in this case is a hold-

ing by this Court that the lower Federal courts must uphold every award rendered by the NRAB, no matter how egregious. Clearly this is not what Congress intended. Equally clearly, *Misco* does not compel that conclusion.

In the present case, the Fourth Circuit held that the NRAB had exceeded its jurisdiction through its manifest disregard of the collective bargaining agreement, and its failure even to discuss critical contract terminology. *Pet. App.* at 8a. The Court of Appeals held that, like an arbitrator, the NRAB is not permitted "to rewrite the provisions of the collective bargaining agreement." *Id.* As noted in the Railroad's Opposition to the Union's Petition for a Writ of Certiorari, the Fourth Circuit's decision was fully consistent with a long series of federal cases holding that an arbitrator is without authority to disregard or modify plain and unambiguous contract provisions, and that an arbitration award will be set aside when it contravenes the express language of a labor contract. *Opposition* at 20-21.

The Fourth Circuit similarly noted in this case that an NRAB award may be set aside if it is "wholly baseless and completely without reason, . . . if [it is] actually and indisputedly without foundation in reason or fact, . . . or if the NRAB decision *fails to draw its essence from the collective bargaining agreement . . .*" *Pet. App.* at 7a-8a (emphasis supplied). All that the Fourth Circuit did in this case was follow well established legal principles, reiterated without alteration in *Misco*. Once again, the Fourth Circuit would not have decided this case any differently had it reached its decision after *Misco*.

C. The opinion of the Fourth Circuit in this case fully conforms to the prior holdings of this Court. Because the decision in *Misco* simply reiterated what this Court "made clear almost 30 years ago" in the *Steelworkers* trilogy, *Misco*, 56 U.S.L.W. at 4013, and did not alter those prior holdings, nothing in *Misco* should compel the Court to grant certiorari in this case.

Respectfully submitted,

H. Russel Smouse
D. Christopher Ohly
Melnicove, Kaufman, Weiner, Smouse & Garbis, P.A.
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Baltimore, MD 21201
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